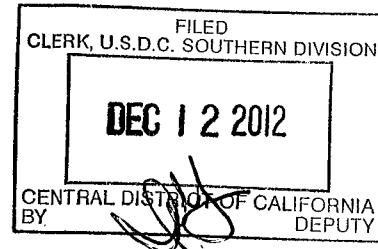


1 I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
2 FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL *Pethenor*
3 (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
4 RECORD IN THIS ACTION ON THIS DATE.

5 DATED: 12-12-12

6 DEPUTY CLERK



1 Although the Petition contains three grounds for relief, the third ground is
 2 directed to the conditions of confinement to which petitioner has been subjected when
 3 making appearances in Orange County Superior Court and is not properly included
 4 in a habeas petition. See Crawford v. Bell, 599 F.2d 890, 891 (9th Cir. 1979) ("[T]he
 5 writ of habeas corpus is limited to attacks upon the legality or duration of
 6 confinement."). In his other two grounds for relief, petitioner is claiming that the trial
 7 court erred in denying his motion for substitution of counsel (known in California as
 8 a "Marsden motion") and that his Sixth Amendment right to self-representation has
 9 been violated.

10 As a general proposition, a federal court will not intervene in a pending state
 11 criminal proceeding absent extraordinary circumstances where the danger of
 12 irreparable harm is both great and immediate. See Younger v. Harris, 401 U.S. 37,
 13 45-46, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971); see also Fort Belknap Indian
 14 Community v. Mazurek, 43 F.3d 428, 431 (9th Cir. 1994) (abstention appropriate if
 15 ongoing state judicial proceedings implicate important state interests and offer
 16 adequate opportunity to litigate federal constitutional issues), cert. denied, 516 U.S.
 17 806 (1995). "[O]nly in the most unusual circumstances is a defendant entitled to have
 18 federal interposition by way of injunction or habeas corpus until after the jury comes
 19 in, judgment has been appealed from and the case concluded in the state courts."
 20 Drury v. Cox, 457 F.2d 764, 764-65 (9th Cir. 1972); see also Carden v. Montana, 626
 21 F.2d 82, 83-84 (9th Cir.), cert. denied, 449 U.S. 1014 (1980). Moreover, the law is
 22 well established that the doctrine also applies to pending state civil proceedings,
 23 when important state interests are at stake. See, e.g., Moore v. Sims, 442 U.S. 415,
 24 423, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979) (pending child custody proceeding);
 25 Huffman v. Pursue, Ltd., 420 U.S. 592, 604, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975)
 26 (pending nuisance action).

27 Younger abstention is appropriate in favor of a state proceeding if three criteria
 28 are met: (1) the state proceedings are ongoing; (2) the proceedings implicate

1 important state interests; and (3) the state proceedings provide an adequate
 2 opportunity to litigate the plaintiff's federal constitutional claims. See Middlesex
 3 County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S. Ct. 2515,
 4 73 L. Ed. 2d 116 (1982); Kenneally v. Lungren, 967 F.2d 329, 331-32 (9th Cir. 1992),
 5 cert. denied, 506 U.S. 1054 (1993); Partington v. Gedan, 880 F.2d 116, 121 (9th Cir.
 6 1989), cert. denied, 497 U.S. 1038 (1990).

7 Here, it appears to the Court that all three criteria for Younger abstention are
 8 met. First, petitioner's SVP proceeding is ongoing in that petitioner still is awaiting
 9 trial. Second, the ongoing SVP proceeding does implicate important state interests.
 10 In enacting California's Sexually Violent Predator Act, the California Legislature
 11 indicated that the state had an interest in identifying sexually violent predators with
 12 diagnosable mental disorders while they were incarcerated as these persons were not
 13 safe to be at large and if released represented a danger to the health and safety of
 14 others in that they were likely to engage in acts of sexual violence. See Historical and
 15 Statutory Comments to Cal. Welf. & Inst. Code § 6600. As the California Supreme
 16 Court observed in Hubbart v. Superior Court, 19 Cal. 4th 1138, 1153 n.20, 81 Cal.
 17 Rptr. 2d 492, 969 P.2d 584 (1999), "The problem targeted by the act is acute, and the
 18 state interests--protection of the public and mental health treatment--are compelling."

19 In considering the third factor, the Supreme Court has noted that "where vital
 20 state interests are involved, a federal court should abstain 'unless state law clearly
 21 bars the interposition of the constitutional claims.'" Middlesex, 457 U.S. at 432.
 22 "[T]he ... pertinent inquiry is whether the state proceedings afford an adequate
 23 opportunity to raise the constitutional claims'" Id. (quoting Moore, 442 U.S. at
 24 430). Here, petitioner's claims are directed to the legality of the pending SVP
 25 proceeding. Accordingly, the Court fails to see why those claims cannot be
 26 adequately addressed by the trial court (to the extent that the trial court has not
 27 already rejected them), or adequately addressed on appeal if an adverse final
 28 judgment is reached in the pending SVP proceeding. See, e.g., In re Smith, 42 Cal.

1 4th 1251, 73 Cal. Rptr. 3d 469, 178 P.3d 446 (2008) (petitioner raising equal
 2 protection claim challenging continuation of SVP proceedings, when the felony
 3 conviction that was the basis of his custody at the time the SVP proceedings were
 4 commenced was reversed on appeal); People v. Taylor, 174 Cal. App. 4th 920, 94
 5 Cal. Rptr. 3d 756 (2009) (appellant raising due process, equal protection, double
 6 jeopardy, and ex post facto claims); People v. Hubbart, 88 Cal. App. 4th 1202, 106
 7 Cal. Rptr. 2d 490 (2001) (appellant claiming inter alia a due process violation on the
 8 basis that he was not in lawful custody at the time the SVP commitment petition was
 9 filed); People v. Buffington, 74 Cal. App. 4th 1149, 88 Cal. Rptr. 2d 696 (1999)
 10 (appellant raising ex post facto, double jeopardy, due process and equal protection
 11 claims).

12 The Court also notes that other federal courts similarly have concluded that
 13 Younger abstention applies to SVP proceedings. See, e.g., Rhoden v. Mayberg, 361
 14 Fed. Appx. 895, 896 (9th Cir. 2009) (now citable for its persuasive value pursuant to
 15 Ninth Circuit Rule 36-3) (“These state civil commitment proceedings are judicial in
 16 nature, implicate important state interests, and afford [the petitioner] an adequate
 17 opportunity to litigate his federal claims.”); Miller v. Cate, 2011 WL 4457666, at *4
 18 (E.D. Cal. Sept. 23, 2011); Shehee v. Baca, 2009 WL 838172, at *1-*2 (C.D. Cal.
 19 Mar. 30, 2009); Clemons v. Kramer, 2008 WL 3833416, at *3-*5 (C.D. Cal. Aug. 15,
 20 2008); Dannenberg v. Nakahara, 1998 WL 661467, at *2 (N.D. Cal. Sept. 22, 1998).

21 Moreover, even if petitioner did present the same claims he now is raising
 22 herein to the California Supreme Court in the Petition for Review of the Court of
 23 Appeal’s denial of his writ of mandate petition that petitioner attempted to file on
 24 November 19, 2012, abstention still would be appropriate. See Drury, 457 F.2d at
 25 765 (exhaustion of federal issue insufficient if criminal proceedings through direct
 26 appeal not yet complete); Murphy v. Wilson, 409 F.2d 840, 841 (9th Cir. 1969)
 27 (exhaustion requirement not satisfied until the state appeal proceedings have been
 28

1 completed and a final state judgment has been entered).²

2 Accordingly, on or before January 14, 2013, petitioner is ordered to show
3 cause, in writing, why this action should not be summarily dismissed pursuant to Rule
4 of the Rules Governing Section 2254 Cases in the United States District Courts
5 without prejudice to refiling after petitioner's SVP proceedings, including appeal, are
6 completed, and petitioner has exhausted his state remedies.

7

8 DATED: December 11, 2012



9
10 ROBERT N. BLOCK
11 UNITED STATES MAGISTRATE JUDGE
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24 ² Although there is no exhaustion requirement for a petition brought under
25 U.S.C. § 2241(c)(3), principles of federalism and comity require that a district
26 court abstain until all state criminal proceedings are completed and the petitioner
27 exhausts available judicial state remedies, unless the petitioner can show that special
28 circumstances warrant federal intervention prior to the state criminal trial. See
Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489, 93 S. Ct. 1123,
35 L. Ed. 2d 443 (1973); Carden, 626 F.2d at 83-84.